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IN THE

Supreme Court of the United States

OCTOBER TERM 1963

No. [redacted] 153

TRUNKLINE GAS COMPANY,
Petitioner,

v.

HARDIN COUNTY,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITIONER'S REPLY BRIEF

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IN THE

Supreme Court of the United States

OCTOBER TERM 1962

No. 1125

TRUNKLINE GAS COMPANY,

Petitioner,

v.

HARDIN COUNTY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITIONER'S REPLY BRIEF

To the Honorable Earl Warren, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Petitioner, Trunkline Gas Company, files this Reply Brief in order to present to the Court a validating act of the Legislature of the State of Texas which became effective after the filing of its petition for a writ of certiorari.

I.

The New Validating Act

Although Respondent did not see fit to bring the fact to the attention of the Court in its brief in opposition, on May 30, 1963, after the filing of Petitioner's petition for a writ of certiorari, a validating act of the Texas Legislature became effective, which not only validates Petitioner's contracts with Respondent which are involved in this case, but also declares the existing Texas law to be contrary to the opinion of the court below. Acts 1963, 58th Legislature, Chapter 240, page 654, provides:

> "Section 1. In the acquisition of all highway rights-of-way by or for the Texas Highway Department, the cost of relocating or adjusting utility facilities which cost may be eligible under the law is hereby *declared to be an expense and cost of right-of-way acquisition.*
>
> "Sec. 2. *All contracts or agreements heretofore made and entered into by the various counties and cities for the purposes stated above are hereby ratified and validated.*
>
> "Sec. 3. All laws or parts of laws in conflict herewith are hereby repealed to the extent of such conflict.
>
> "Sec. 4. *The fact that the provisions of this Act are necessary in order to clarify existing law* as to the proper classification of costs incurred for the relocation or adjustment of utility facilities as a part of the acquisition of right-of-way creates an emergency and an imperative public necessity that the Constitutional Rule requiring bills to be read on three several days in each House be suspended, and said Rule is hereby suspended; and that this Act shall take effect and be in force from and after its passage, and it is so enacted." (Emphasis supplied).

II.

Petitioner's contracts with respondent having been validated, the judgment of the Court of Appeals should be set aside.

It has been settled by the decisions of the Texas Supreme Court and of this Honorable Court that, upon the enactment of a validating act pending an appeal or petition for certiorari, the new statute will be given effect just as if it had become effective before the institution of the suit. And under this settled rule of law, the validating act quoted above requires that the judgment of the Court of Appeals in this case be set aside and that of the trial court affirmed.

In *Brown* v. *Truscott Independent School District*, 34 S.W. 2d 837, 839 (Tex. Com. App., 1931), the trial court had dismissed Brown's suit against the school district and others for the cancellation of the district's bonds, for an injunction prohibiting the collection of taxes and for judgment declaring the district's creation void. After the hearing of the case by the Court of Civil Appeals, which held the bonds to be valid, the Legislature had enacted a validating act which expressly validated both the creation of the district and the bonds as obligations of the district. On Brown's application for writ of error, the Commission of Appeals expressly refrained from passing upon Brown's assignments of error because the validating act had become effective. The Commission held:

> "To our minds the above [validating] act is sufficient, by its terms, to validate this district and its bonds, both assumed and directly issued, even though it be conceded that the new district was invalid in the beginning, a matter we do not pass upon. The power of the Legislature to enact curative statutes

> of this kind is no longer an open question in this state. [Citing cases.] Under the above authorities we hold this district, together with its bonded indebtednesses, both assumed and directly issued, now legal and valid." • • •
>
> "In this connection we hold that a curative statute enacted by the Legislature, and becoming effective during the pendency of an appeal, writ of error, or even a motion for rehearing on a case to which it applies, cures the defect the same as if such act had become effective before the institution of the suit."

Holding to exactly the same effect are *Desdemona Independent School District* v. *Howard*, 34 S.W. 2d 840 (Tex. Com. App., 1931); *Lyford Independent School District* v. *Willamar Independent School District*, 34 S.W. 2d 854 (Tex. Com. App., 1931); *Hunt* v. *Atkinson*, 17 S.W. 2d 780 (Tex. Com. App., 1929). The Texas courts have accordingly held that bonds, contracts, patents and other acts have been cured or validated by retroactive validating or curative statutes. *City of Deer Park* v. *State*, 275 S.W. 2d 77 (Tex. Sup., 1954) (annexation ordinance); *Duncan* v. *City of Waco*, 81 S.W. 2d 57 (Tex. Sup., 1935) (city bonds, tax levies and annexation ordinance); *State* v. *Bradford*, 50 S.W. 2d 1065 (Tex. Sup., 1932) (patent granting public lands); *Anderson County Road District No. 8* v. *Pollard*, 296 S.W. 1062 (Tex. Sup., 1927) (county road district bonds); *Tom Green County* v. *Moody*, 289 S.W. 381 (Tex. Sup., 1926) (county road bonds); *Nolan County* v. *State*, 17 S.W. 823 (Tex. Sup., 1891) (county road bonds).

This Honorable Court has followed the same rule as to the validity of retroactive validating statutes as the Texas courts. *Kansas City Southern Railway Company* v. *Road Improvement District No. 3*, 266 U.S. 379 (1924) (validating act passed pending appeal); *Charlotte Harbor*

& Northern Railway Company v. *Wells*, 260 U.S. 8 (1922) (validating act passed pending suit); *Bolles* v. *Town of Brimfield*, 120 U.S. 759 (1887) (act validating city bonds after issue). And, in a situation such as presented in this case, this Court has also held that the judgment of the court below should be set aside and the case remanded so that the court below may give effect to a supervening change of the applicable law. *Williams* v. *Georgia*, 349 U.S. 375 (1955); *State Tax Commission of Utah* v. *Van Cott*, 306 U.S. 511 (1939); *Patterson* v. *Alabama*, 294 U.S. 600 (1935); *Dorchy* v. *Kansas*, 264 U.S. 286 (1924); *Gulf, Colorado & Santa Fe Railway Company* v. *Dennis*, 224 U.S. 503 (1912). Thus, in *Patterson* v. *Alabama*, *supra*, 294 U.S. 607, this Court held:

> "We have frequently held that in the exercise of our appellate jurisdiction we have power not only to correct error in the judgment under review but to make such disposition of the case as justice requires. And in determining what justice does require, the Court is bound to consider any change, either in fact or in law, which has supervened since the judgment was entered. We may recognize such a change, which may affect the result, by setting aside the judgment and remanding the case so that the state court may be free to act."

The only qualification as to the validity of a retroactive validating statute which is stated in any of the decisions cited above is that the act or contract validated by the new statute must be one which the legislature could have originally authorized. In this case, that qualification has been met. It has been settled by the Texas Supreme Court that the Legislature could have originally authorized Petitioner's contracts with Respondent. *State* v. *City of Austin*, 331 S.W. 2d 737 (Tex. Sup., 1960).* The *Austin* case involved

* Cited by Respondent at page 8 of its brief in opposition.

the relocation and adjustment of utility lines (including pipe lines) originally located entirely within the rights of way of public streets and roads, not facilities originally located in private easements such as Petitioner's here. The utility lines involved had been installed in the public rights of way under statutes which required their owners to relocate or adjust the lines in the public rights of way at their own cost whenever requested by the State to accommodate new highway facilities. The Legislature had thereafter enacted a statute providing the utility owners should be reimbursed when relocation or adjustment was required for the construction in Interstate Highways (Vernon's Ann. Civ. Stats., Article 6674w-4, Acts 1957, 55th Leg., Ch. 300, p. 724). The State sued for judgment declaring the new statute unconstitutional. The Texas Supreme Court held that the statute is constitutional and that the State is required to pay the costs of adjustments and relocations required for Interstate Highways. Under the *Austin* case, the new validating act quoted above is a statute which the Legislature could have validly enacted prospectively. Therefore, as a validating act it is also valid and should be given effect according to its terms by this Court.

Accordingly, under the decisions of this Court and those of the Texas Supreme Court, the judgment of the Court of Appeals should be set aside in order that the new validating act may be given effect.

III.

The new validating act shows the decision of the court below to be in conflict with the applicable Texas law.

The attention of the Court is respectfully called to Section 4 of the new validating act quoted above. This section provides expressly that the new statute is necessary "*to clarify*

existing law." This language clearly shows the law of the State of Texas existing at the time of the Court of Appeals' decision and now is that the cost of adjusting pipe lines was part of the acquisition of rights of way for state highway construction and within the statutory authority of Respondent for right of way acquisition. Therefore, the new statute, like the authorities cited in Petitioner's petition, shows the decision of the Court of Appeals, that Respondent had no statutory power to pay for the adjustments of Petitioner's pipe line, to be erroneous and in conflict with the applicable law of Texas.

Conclusion

For the foregoing reasons and the reasons stated in its petition, Petitioner submits that its petition for a writ of certiorari should be granted and that the judgment of the Court of Appeals should be set aside so that effect may be given to the new statute quoted above.

Respectfully submitted,

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Proof of Service

The undersigned counsel for Petitioner, Trunkline Gas Company, a member of the Bar of the Supreme Court of the United States, certifies that copies of the foregoing brief have been served upon Respondent, Hardin County, by depositing same in the United States Mail, with first class postage prepaid, addressed to Mr. William Robert Smith, 1508 Tower Life Building, San Antonio 5, Texas, and Messrs. Sears and Burns, 1811 C & I Life Building, Houston 2, Texas, counsel for Respondent, this 10th day of July, 1963.

.....

Cecil N. Cook
Counsel for Petitioner